



**State of New Hampshire**  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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AFSCME Council 93, Local 3657  
Hillsborough County Corrections Employees

Complainant

v.

Hillsborough County Department of Corrections

Respondent

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Case No: G-0018-2

Decision No. 2005-162

APPEARANCES

Representing the Complainant:

Erin S. Goodwin, Esquire, Associate General Counsel AFSCME Council 93

Representing the Respondent:

Carolyn M. Kirby, Esq., Legal Counsel, Hillsborough County

BACKGROUND

AFSCME Council 93, Local 3657, Hillsborough County Corrections Employees (hereinafter "Union") filed an unfair labor practice complaint on May 18, 2005 alleging that the Hillsborough County Department of Corrections (hereinafter "County") committed an unfair labor practice in violation of certain provisions of RSA 273-A:5 I (a) interfering with employees in the exercise of rights conferred by this statute; (b) dominating or interfering with the administration of an employee organization; (c) discriminating in the terms and conditions of employment of its employees for the purpose of encouraging or discouraging membership in an employee organization; (e) failing to negotiate in good faith; (g) failing to comply with a provision of RSA 273-A and its associated administrative rules; (h) breaching the collective bargaining agreement (hereinafter "CBA"); and (i) undertaking an action that invalidates a portion of the CBA. At issue in the alleged violations is a position taken by the County requiring that the Union bargain, at mid-term of an existing CBA over the terms and conditions of employment for certain positions that had been added to the bargaining unit. These positions were added to the bargaining unit by agreement of the parties through the

certified modification process employed by the PELRB. The parties disagree as to the applicability of the terms of that CBA to the later included positions.

A pre-hearing conference was conducted on June 30, 2005. Thereafter, on July 28, 2005 an evidentiary hearing was conducted at which both parties appeared and were represented by counsel. Prior to the evidentiary hearing, the parties submitted an agreed stipulation of facts that was accepted by the PELRB and appear below as Findings of Fact #1 through #6. Each had the opportunity to present witness testimony and to undertake cross-examination as well as the opportunity to offer exhibits. Following the conduct of the hearing, the record was left open to allow the parties to submit post-hearing legal memoranda. Following submission by the parties, the record was closed on August 30, 2005.

### FINDINGS OF FACT

1. Hillsborough County is a public employer under RSA 273-A.
2. AFSCME Council 93, Local 3657 is currently the certified exclusive representative of certain employees of the Hillsborough County Department of Corrections.
3. A Bargaining Unit Certification dated December 7, 1976 identified AFSCME Local 2715 as the certified representative for corrections officers at the Hillsborough County House of Corrections. (Joint Exhibit #9).
4. On September 8, 2004, AFSCME and the County signed a collective bargaining agreement. (Joint Exhibit #3).
5. The 1976 bargaining unit certification was modified on November 15, 2004 to change the identity of the certified bargaining unit representative to be AFSCME Local 3657 and to include the following positions in the unit: Account Clerk 1, Clerk Typist 1, Cook 1, Maintenance Worker 1, Nurse 1, Secretary 1 and Switchboard Operator/Receptionist. (Joint Exhibit #1).
6. Superintendent James O'Mara, Jr., on behalf of the County, forwarded a letter dated November 30, 2004 to AFSCME's staff representative for "expedited negotiating sessions..." (Joint Exhibit #4).
7. The County and the Union were parties to a collective bargaining agreement effective July 1, 1995 through June 30, 2002. (Joint Exhibit #2).
8. AFSCME Local 3657 is the successor representative to AFSCME Local 2715 The County was mistaken when it stated the inverse in its agenda and recorded minutes of the County Legislative Delegation. (See Union Exhibits #8 and #9, County Exhibit #10).
9. The Recognition Clause of the parties' CBA in effect for the period July 1, 1995 through June 30, 2002 includes the positions of: Account Clerk I; Clerk Typist I; Cook I; Maintenance Worker I; Nurse I; Secretary I and Switchboard Operator/Receptionist.

10. Stephen Lyons is the Union's Staff Representative and acted as Chief Negotiator of the current CBA between the parties. He credibly testified that the positions in dispute as listed in the above Finding of Fact #9 had been subject to negotiations between the parties in the previous CBA, effective July 5, 1995 (Union Exhibit #2) and that the Union and County had also resolved grievances on behalf of individuals employed within some of those positions in the past.
11. Some of the positions at issue in these proceedings have had their terms and conditions of work negotiated by the parties beginning with the original unit certification in 1976 prior to county departmental reorganization.
12. During the parties' negotiations of the present CBA, they both participated in other proceedings before the PELRB, spanning the period February 2004 to November 2004, that specifically amplified notice to them of an inconsistency between the positions they had historically negotiated and the original unit certification issued by the PELRB in 1976. (See County Exhibit #3 PELRB Decision #2004-027 and County Exhibit #6, PELRB Decision # 2004-056).
13. Both parties were aware during their negotiations and before the current CBA was tentatively agreed to that they were negotiating the terms and conditions of work for the positions at issue in these proceedings and that had not been formally added to the bargaining unit through the certification procedure before the PELRB.
14. The CBA negotiated by the parties and its predecessor specifically makes reference to benefits attaching to the positions at issue here. (See Union Exhibit #5, pp. 16, 23, 24, and 25; see also Union Exhibit #2, pp. 17, and 19).
15. The Union and the County participated in these negotiations for a successor agreement over a protracted period of time extending from approximately April 2001 and continuing on an intermittent basis through a tentative agreement achieved in March 2004, subsequently ratified by the parties on April 15, 2004 by the Union (see Union Exhibit #3) and on June 24, 2004 by the County (see Union Exhibit #9) and concluding with a final executed CBA signed in September 2005.
16. Mr. Lyons also testified, without contradiction, that no dispute arose between he and the County's chief negotiator at the time, Gary Wulf, regarding these positions during their negotiations for the successor CBA.
17. Despite knowledge of inconsistencies between the actual unit composition, for which the parties have bargained in good faith for at least ten years, and the unit certification on file with the PELRB, neither party endeavored to bring the unit certification in line with the parties' long standing understanding that these positions were subject to the terms and conditions of the parties' former and present collective bargaining agreements until the parties did so, by mutual agreement and petition filed with the PELRB, on October 21, 2005.

18. Andrew Jubinville, chairman of the union chapter, testified that he became aware in April 2004 that the positions listed in the recognition clause of the parties' CBA were not positions properly certified as being within his bargaining unit.
19. James M. O'Mara, Jr. is the superintendent of the County's House of Corrections and testified that he was aware that the positions had been previously subject to negotiated agreements and, following notice of other proceedings being initiated before the PELRB in February, subsequently informed the County's Commissioners of the problem of the "out of date certification".
20. Mr. O'Mara also made the command staff, including Lt. Vaca, aware of the discrepancy between the positions subject to the ongoing negotiations at the time negotiations were still active.
21. Lt. Vaca was the resource person at the negotiations table assisting the County in the collective bargaining process.
22. The parties arrived at their tentative agreement in or about March 2004 and indicated their agreement of those positions for which they had intended their agreement to cover by initialing that page upon which the Recognition Clause appeared. (See Union Exhibit #5, p.1) These positions included all of those at issue in these proceedings.
23. As a result of other proceedings before the PELRB, during negotiations between the parties, several positions that had previously been subject to negotiations between these parties were removed from these negotiations and made subject to negotiations between the County and the Teamsters, another union.
24. The County and the Teamsters reopened negotiations to add the newly transferred positions as the County and the Teamsters had already concluded their negotiations for the bargaining unit as it was comprised before the addition of the newly assigned positions.
25. On May 20, 2004 the County's Board of Commissioners undertook, through conduct of an "unusual" telephone poll, to approve the tentative agreement for "those employees covered by the bargaining unit certification". The unusual device of the telephone poll on such a matter was utilized "in light of the [Executive] Board's prior review of the proposed agreement with [the County's negotiator] and its consultation with counsel regarding legal issues involving the bargaining unit." (County Exhibit #9, p.8.) This vote was later confirmed at a meeting of the Board of Commissioners on May 26, 2004 although the minutes did not become official until signed by the Clerk on September 22, 2004.
26. On February 25, 2005 the County delegation was informed by Superintendent O'Mara that the "members of AFSCME (the Union) have gone many years without a contract." and reviewed the cost package with the delegation members. (County Exhibit #11 - Minutes dated 2/25/05).

27. The terms and conditions of the new CBA, including wages and contributions to health premiums, became effective July 1, 2004 although the CBA was not executed until September 8, 2004.
28. On July 9, 2004 After negotiations were complete and the tentative agreement signed and ratified, Superintendent O'Mara determined that there had been a miscommunication among management representatives involved in the negotiations resulting in the recognition that the CBA costs would be greater than earlier estimated for this CBA.

### DECISION AND ORDER

#### JURISDICTION

The Public Employee Labor Relations Act (RSA 273-A) provides that the PELRB has sole original jurisdiction to adjudicate claims by the exclusive representative of a certified bargaining unit comprised of individuals employed by a "public employer" as defined in RSA 273-A:1, I. (See RSA 273-A:6, I). The PELRB also is authorized to determine whether claims alleging the commission of an improper or unfair labor practice pursuant to RSA 273-A:5, I are filed in a timely manner as calculated in RSA 273-A:6, VII. The PELRB also has the authority to certify the composition of a public employee bargaining unit. (See RSA 273-A:8).

#### DISCUSSION

The County has requested that the board dismiss the Union's complaint on the basis that it was not filed in a timely manner. Before the board can consider the merits of the Union's charges, it must first examine whether the Union complaint filed on May 18, 2005 meets the statutory requirement found in RSA 273-A:6, VII. The board examines the timeliness of the filing of a complaint alleging the commission of an unfair labor practice by determining the date of the occurrence from which the six-month limitation for filing begins to run. This occurrence is commonly referred to as the "triggering event." If the Board finds that more than six-months have passed from the date of the triggering event to the date a complaint is filed with the PELRB, then that complaint is deemed untimely and must be dismissed, lacking the existence of any circumstance that would toll the running of this statute of limitations.

The evidence presented reveals that Union and the County participated in negotiations for a successor agreement to their then existing CBA, effective July 1, 1995 to June 30, 2002, over a protracted period of time extending from approximately April 2001 and continuing on an intermittent basis into 2004. The parties reached a tentative agreement in March of 2004 that was subsequently ratified by the Union on April 15, 2004 (see Union Exhibit #3) and on June 24, 2004 by the County (see Union Exhibit #9). Although the terms and conditions of the new CBA, including wages and contributions to health care premiums became effective July 1, 2004, the parties did not sign the final CBA until September 8, 2004.

Andrew Jubinville, chairman of the union chapter, testified that in or about April 2004 he became aware that the positions listed in the recognition clause of the parties' CBA were not

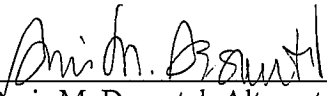
positions properly certified as being within his bargaining unit. The weight of the evidence also leads us to the belief that the Union knew that the positions at issue here were not being provided with the same benefits as those other positions appearing in the recognition clause that were properly certified as being within the certified bargaining unit as it existed on July 1, 2004 when new benefits became effective. We also believe that if there was any remaining doubt in the minds of the Union representatives as to whether the individuals employed in the positions at issue here were to receive the benefits of the new CBA and be subject to the obligations therein, that residual doubt should have been removed when wages were paid and health insurance deductions were made following the September 8, 2004 signing of the CBA. We find no sufficient grounds for tolling the running of the six-month statute of limitations. Potential claimants must often decide how long to contemplate or to participate in informal actions designed to resolve matters in dispute before taking formal action. It is the very purpose of a limitation period to force an election at some point.

We therefore find that, as the Union did not file a complaint until May 18, 2005 more than six months had elapsed from the time that the County's actions clearly expressed its position not to provide for these positions under the terms of the new CBA. Consequently, we cannot consider the merits of the Union's charges. The Union's complaint is hereby DISMISSED.

The parties shall immediately meet and complete negotiations for the positions of: Account Clerk I; Clerk Typist I; Cook I; Maintenance Worker I; Nurse I; Secretary I; and Switchboard Operator/Receptionist.

So ordered.

Signed this 30<sup>th</sup> day of December, 2005.

  
Doris M. Desautel, Alternate Chair

By unanimous vote. Alternate Chair Doris M. Desautel presiding with Board Member Seymour Osman and Richard E. Molan, Esq. also voting.

Distribution:  
Erin S. Goodwin, Esq.  
Carolyn M. Kirby, Esq.